

THE IMMIGRANT PLIGHT/IMMIGRATION LAW: A STUDY IN INTRACTABILITY

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*Intractable problems, ones that defy solution because of conflicting lines of force, almost always require an outside catalyst for any movement toward an answer. This Essay explores intractability through two parallel historical moments of conflict: debate over slavery in ante-bellum America and debate over aliens in current America. Severe discrimination (based on difference, racial prejudice, communal identity formation, and larger psychological needs) deprives these disadvantaged groups of human rights and the protection of law. Nineteenth-century slavery and twenty-first century illegal immigration also share another quality. Both stimulate virulent forms of rhetorical excess that endanger the body politic and threaten the social fabric of an increasingly divided United States. The connection of law and literature offers a catalyst, an opportunity for a change in perspective through the power of fiction. As Harriet Beecher Stowe's novel, *Uncle Tom's Cabin*, forced recognitions of a common humanity against slavery, so Henry Roth's classic immigrant novel, *Call It Sleep*, indicates some of what is currently needed now. The synergy between legal and literary forms of address encourages a deeper realization, and that realization, in turn, raises a question about intractable problems in general. Can the rule of law, when law itself is questioned, respond through its equal partner, the right to free expression?*

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I. THE INTRACTABILITY PROBLEM DEFINED

Some intractable difficulties remain unsolved even though fully realized. They remain unsolved not because they lack solutions, but because the conflicting lines of force against answers are mutually

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reinforcing. As these lines of force compete with each other, they nonetheless join in a mutual assessment: nothing will change. A solution, if it is to happen, must therefore come from outside of the problem as currently understood. Either impending catastrophe or an alternative frame of reference must transform attitudes and stances taken.

When it becomes necessary to compromise, everyone engaged in a relentless dispute naturally prefers the second option, an alternative frame of reference, but few combatants willingly recognize or fear the first option, catastrophe, until it is upon them, thus making the implementation of the second alternative twice as difficult. To come to a different understanding of an intractable problem, the people in conflict must see the need, and change more than the problem itself. Those who absolutely disagree must identify the problem in a fresh way, and this typically means they must do so through information already available to them. Severe problems do not solve themselves, but they commonly contain a submerged language of solution that another perspective can wield to advantage.

Against intractability, the claims in this Essay are solution oriented. First, they propose that an alternative frame of reference can recover realities obscured by dispute. Second, they show that the best re-framers of reference seem to be touchstones or catalysts that do not change themselves but shift the focus in conflicting points of view. Finally, they show that Alexis de Tocqueville is only half right when he argues that disputes in America come down to a legal question.¹ Tocqueville sees the centrality of law in disputes, but he misses a vital homology between legal and more familiar modes of discourse, namely that the catalyst needed for a solution often comes from outside of legal discourse. Law is a reactive mode; it is notoriously slow to change until pressure is put upon it. It follows that these first three claims lead to a fourth and larger one—the connections between law and literature (and other more popular forms of communication) can show us how intractable problems develop and even how they might be solved.

The intractable issues of our times are not hard to find. They include gun violence, the drug epidemic, electoral imbalance, unwanted pregnancy, a collapsing infrastructure, economic recession, global warming, nuclear proliferation, war, terrorism, overcrowded prisons, serious pockets of poverty, urban blight, and the cost of medical care, among others. All of these issues draw public attention in mostly futile ways, but the most volatile and unreasoned debate of the moment involves immigration.

Controversies over aliens in America have grown extreme and increasingly ugly in contemporary exchange. What it means to be a foreign person on American soil begins to disappear when a member on the floor of Congress can generate whole news cycles with the assertion that pregnant women have been flying in from the Middle East carrying “terror babies” in their wombs that will “destroy our way of life.”² Without communal reprimand, elected officials now say pregnant immigrants are multiplying rats, compare illegal aliens to the threat of Hitler, and say border agents should “shoot to kill.”³

¹ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (1840).

² Louis Buller Gohmert, Jr., U.S. Representative from Texas, 1st Congressional District, made this charge on the floor of Congress on June 24, 2010, and repeated it on the *Anderson Cooper 360* television show, on August 12, 2010. *Anderson Cooper 360* (CNN television broadcast June 28, 2010); see also Elise Hu, *TX Rep. Louie Gohmert Warns of Terrorist Babies*, TEXAS TRIB., June 28, 2010; Hu, *Gohmert Debates “Terror Babies” on CNN*, TEXAS TRIB. Aug. 13, 2010. “Terror babies,” denied as a problem by the FBI, derives from the similarly unrealistic concept of “anchor babies,” which refers to the unsubstantiated assumption that illegal aliens are having their babies in the United States to obtain citizenship through them.

³ State Representative John Yates of Georgia compares the threat from illegal immigration to the rise of Hitler in World War II and wants border agents to be free to “shoot to kill.” State Representative Curry Todd of Tennessee calls pregnant illegal immigrants multiplying rats. See Charles M. Blow, *Silliness and Sleight of Hand*, N.Y. TIMES, Apr. 29, 2011, at A21. Extreme views on the immigrant problem, all supporting the impossibility of “sealing the border,” extend to the highest debates in the country as recent exchanges in presidential debates amply attest, and yet no contender for

Acrimony of this kind is dangerous far beyond its subject, one of many reasons for reducing the subject to analytical terms. Parts II, III, and IV of this Essay detail the objective cultural, political and legal lines of force that make immigration an intractable problem. Part V explains why literature, in its most flexible form, the novel, can be a catalyst for changing points of view. Part VI turns to the immigrant's plight through the lens of the most powerful immigrant novel in American literature, Henry Roth's classic *Call It Sleep*. Published in the dark year of 1934, *Call It Sleep* records the life of a bewildered Jewish boy from his arrival in the United States at the age of two until he is just eight years old on the lower East Side of New York City. Part VII, with the full plight of the immigrant in place, explores the dynamic required for a fresh perspective. It looks to the synergy between legal and literary forms of address where intractability sometimes yields to deeper realization. It asks a crucial question: can the rule of law, if law itself is questioned, respond to its equal partner, the right of free expression?

II. THE LINES OF FORCE EXPLAINED

One can understand the anger in fights over immigration only by grasping the ideological contradictions at the core of the subject. Etched on the pedestal of the Statue of Liberty are official words from 1886 that greet new arrivals in the harbor of New York City. They read as follows:

... "Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore.
Send these, the homeless, tempest-tost to me,
I lift my lamp beside the golden door!"⁴

These words, placed figuratively in the mouth of the statue as "The Mother of Exiles," come from a solicited sonnet by the poet Emma Lazarus, and they offer an unqualified welcome to all who come without exception. Indeed, the more desperate the recipient of these words, the more urgently they claim to apply.⁵

But does the assumed right to welcome also imply an alternative power to exclude, and if so, who gets to exclude and why? Subliminal processes are at work here. In a nation driven by the concept of property, no one questions the right of an owner to keep others off of privately held land. Nor, for that matter, does anyone deny the right of a government to bar those who threaten its understanding of itself. But how do these ideas extend into the common understanding of citizens who "own" a country in a way that a new arrival does not? In normative if not legal terms, what is it about a conception of country that gives ordinary citizens the right to restrict conditions for an alien on common ground? Put another way, what has happened to Emma Lazarus's words on the Statue of Liberty? A politics of exclusion has denied the spirit of welcome to millions currently in the land, and it has created a helpless population out of many recent arrivals. There is now a huge underclass that cannot, in the words of "The Mother of Exiles," "breathe free" anywhere in the United States. Talk of a "golden door" is shut to anyone in this category. Legal regulation has produced its own domestic category of "wretched refuse," and the people in it are treated in ways that would be thought unjust for anyone else in America. "Illegal

the highest office is in favor of comprehensive reform. See *Borderline Ridiculous: The Republican Presidential Candidates Get Immigration Wrong*, N.Y. TIMES, Sept. 17, 2011, at A20.

⁴ Emma Lazarus, *The New Colossus*, lines 24–36.

⁵ The Statue of Liberty, a joint effort of France and the United States, dedicated on October 28, 1886, became a project in nationalist identity during the centennial celebration of 1876 in commemoration of the Franco-American alliance during the American War of Independence. Emma Lazarus's sonnet, written in 1883, was written for the statue still under construction at the time. Ironically, the Mother of Exiles ceases to fulfill that title in the very year, 1924, that she officially becomes a national monument in Liberty Park under the auspices of the War Department. In that same year Congress passed the first laws restricting immigration to the United States. See OSCAR HANDLIN, *STATUE OF LIBERTY* 61–65 (1971).

alien” describes twelve million souls in limbo in the United States.⁶ The very term is a crafted double negative and a pejorative slogan in contemporary political discourse.

Both its parameters and the nature of the situation identify immigration as an intractable problem. *First*, you cannot forcibly remove twelve million illegal aliens now living regularly and peaceably on American soil without rending the ethos and republican fabric of the United States. *Second*, and in contradiction, a largely white, and now threatened, majority of Americans wishes that people arriving from new ethnicities would go away. *Third*, racial prejudice, as part of “a superiority complex” in human thought, shapes many opinions on this subject.⁷ *Fourth*, hard economic times increase prejudice and vocational anxiety and threaten the assumed superiority of longer-term inhabitants even though recent arrivals fill low-end jobs that no one else wants. *Fifth*, immigration law has devolved into an acknowledged failure. No one trusts a system filled with contradictions and hypocrisies for all sides in dispute to see.

III. THE HOLDS OF PREJUDICE AND ASSUMED SUPERIORITY

Prejudice based on human difference takes virulent forms in American culture. It is embedded in national understandings from the founding moment. The Federal Constitution of 1789 dignifies prejudice based on human difference through the institution of slavery. It assumes some people are intrinsically unworthy through ethnic distinction, an assumption that applies again to foreign-born arrivals during the waves of immigration of different peoples in the nineteenth and twentieth centuries.⁸ Race and ethnicity are woven into the very fabric of this nation. Every required decennial federal census from the first in 1790 honors racially or ethnically classified distinctions as keys to American identity.⁹

The point to be recognized here is the tenacity of prejudice assigned to human difference. The end of slavery in 1865 did not reduce prejudice against those freed from bondage; if anything, it seems to have exacerbated biases by threatening white hegemony. “It is tempting,” writes Daniel Aaron in *The Unwritten War*, “to read into the intersectional war a redirected or displaced aggression against blacks—

⁶ Estimates of illegal aliens are necessarily imprecise and fluctuate according to economic conditions and other variables. Perhaps the most accurate figures come from the Pew Hispanic Center, putting the figure at 11.9 million in 2008. See JEFFREY PASSEL & D’VERA COHN, PEW RESEARCH CTR., A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES 1–2 (2009). Other estimates vary between seven to twenty million illegal aliens in this country.

⁷ The most articulate and extensive philosophical rendition of the superiority complex, also a celebration of it, can be found in the writings of Friedrich Nietzsche, all of which tie a will to power and the right to conquer the weak to forms of anti-Semitism. Nietzsche blames the Jewish mentality for the downward turn in Western history. For examples of the superiority complex and the prejudices behind it, see FRIEDRICH NIETZSCHE, THUS SPOKE ZARATHUSTRA 62–63, 202–20, (Thomas Common trans., 1917) (1885); FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL §§ 48, 62, 195, 210–12, 258, 265, 293 (Marianne Cowen trans., 1955) (1885); FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS AND ECCO HOMO §§ 1.7, 1.9, 1.13, 2.6 (Walter Kaufmann trans., 1967) (1887); FRIEDRICH NIETZSCHE, TWILIGHT OF THE IDOLS 102–03 (R. J. Hollindale trans., 1968) (1888); FRIEDRICH NIETZSCHE, THE ANTI-CHRIST §§ 2, 3 (R. J. Hollindale trans., 1968) (1888). For a good analysis of the implications of prejudice and cruelty in Nietzsche’s philosophy, see JONATHAN GLOVER, HUMANITY: A MORAL HISTORY OF THE TWENTIETH CENTURY 11–17 (1999).

⁸ U.S. CONST. art. 1, § 2, distinguishes between “free persons” and “three-fifths of all other persons” for purposes of representation. Article one, section nine allows the importation of slaves. Article four, section two creates a fugitive slave law that treats a whole category of human beings as lost property. For a detailed account of the inequalities fostered by the Constitution, see ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 7–39 (2002).

⁹ For a recent in depth discussion of race on which this paragraph depends, see Kenneth Prewitt, *Racial Classification in America: Where Do We Go From Here?*, 134 DAEDALUS 5 (2005); David Hollinger, *The One Drop Rule & the One Hate Rule*, 134 DAEDALUS 18 (2005); Louis H. Pollak, *Race, Law & History: The Supreme Court from Dred Scott to Grutter v. Bollinger*, 134 DAEDALUS 29 (2005). Race and ethnicity belong to the same continuum of perceived difference with prejudice reaching across the categories at admittedly different levels of intensity.

outcasts before, during, and after the War.”¹⁰ Those figuratively “outcast” could be rejected because they belong to “an alien black race.”¹¹ Discrimination in a country dedicated to equality depends on stark use of such words. To be “outcast” and “alien” justifies otherwise unacceptable levels of negative treatment. If you are in either category, you do not belong and are without full rights or legal protection.¹²

The term “outcast” pushes away. The term “alien” excludes. Taken together, the two clarify the boundaries of an established society. They circumscribe the familiar order, protect the status quo, and encourage nationalistic expression based on omission. Sociologists argue that discrimination answers fear of outsiders by fostering “group identification.”¹³ When social standing is questioned, “discriminatory behavior is perceived to be instrumental” in status formation.¹⁴ In more anthropological terms, groups stabilize themselves through “rules of pollution” that keep others out. The definition of what one is not (and does not want to be) gives form to identity and worth by marking the unworthy.¹⁵

History, sociology, and anthropology all point toward an innate impulse in human nature. The so-called “inferiority complex” has been a concept in behavioral disorders and in popular culture from the moment the psychotherapist Alfred Adler coined the phrase in 1937, but its wide acceptance beyond professional ranks depends on an implicit polar opposite: “the superiority complex.”¹⁶ Identity formation differentiates itself by finding a category outside and preferably inferior to it. Everyone, it seems, needs someone or something to look down upon, whether through race, status, ability, class, ancestry, association, ownership, vocation, education, fortune, or family connection.¹⁷

Pejorative use of these categories influences attitudes toward new arrivals and allows prejudice to become a barometer on immigration issues. Debate is then colored by a questionable but deeply held conviction: “the pervasive tendency to regard people of different races as essentially different kinds of people,” a conviction that rarely distinguishes between designations based on physical perception and geographical origin.¹⁸ The ensuing confusion over racial definition renders debate sharp and misdirected.

¹⁰ DANIEL AARON, *THE UNWRITTEN WAR: AMERICAN WRITERS IN THE CIVIL WAR* 333 (1973).

¹¹ See LEWIS P. SIMPSON, *The Civil War and the Failure of Literary Mind in America*, in *THE BRAZEN FACE OF HISTORY: STUDIES IN THE LITERARY CONSCIOUSNESS IN AMERICA* 109–10 (1997).

¹² For the logic of how racial deprivation works in practice, see Derrick A. Bell, Jr., *The Racial Imperative in American Law*, in *THE AGE OF SEGREGATION: RACE RELATIONS IN THE SOUTH 1890–1945* 3, 3–28 (Robert Haws ed., 1978).

¹³ See generally Herbert Blumer, *Race Prejudice As a Sense of Group Position*, 1 *PAC. SOC. REV.* 3 (1958); Ryan D. King & Darren Wheelock, *Group Threat and Social Control: Race, Perceptions of Minorities, and the Desire to Punish*, 85 *SOC. FORCES* 1255 (2007).

¹⁴ The quotations are taken from the leading proponent of group threat theory. See HUBERT M. BLALOCK, JR., *THEORETICAL PROPOSITIONS, TOWARD A THEORY OF MINORITY-GROUP RELATIONS* 204 (1967).

¹⁵ Ian Hacking, *Why Race Still Matters*, 134 *DAEDALUS* 102, 114 (2005).

¹⁶ See generally Alfred Adler, *Psychiatric Aspects Regarding Individual and Social Disorganization*, 42 *AM. J. SOCIOLOGY* 773 (1937). For an account of “the superiority complex” on which this paragraph depends, see Robert A. Ferguson, *Historical Contingency and the Spirit of Law*, in *SESQUICENTENNIAL ESSAYS OF THE FACULTY OF COLUMBIA LAW SCHOOL* 70 (2008), available at http://cms1.runtime.com/null/download?&exclusive=filemgr.download&file_id=18371.

¹⁷ To see the superiority complex at work in popular American culture today, one need only attend an athletic contest. More often than not, the athletes who win and their supporters will raise their forefingers in the air and chant “we are number one!” The practice is as pervasive as it is puerile and superficial, but it wouldn’t happen with such regularity if it didn’t bespeak a subliminal primal need about identity.

¹⁸ Hacking, *supra* note 15, at 114. For a geographical emphasis on racial distinction, see CORNEL WEST, *A Genealogy of Modern Racism*, in *PROPHECY DELIVERANCE! AN AFRO-AMERICAN REVOLUTIONARY CHRISTIANITY* 47, 47–65 (1982). For a cognitive approach to racial distinction, see generally LAWRENCE HIRSCHFELD, *RACE IN THE MAKING: COGNITION, CULTURE, AND THE CHILD’S CONCEPTION OF HUMAN KINDS* (1996).

Contending voices grow especially shrill through yet another level of confusion that is not always recognized. An unresolved ideological concern divides debaters on immigration. Americans can never make up their minds whether homogeneity or difference is the main source of strength in the nation, and it is a disagreement too sensitive for leading political figures to address in a serious way.

The overall effects of these ingrained but confused attitudes on racial assumptions have enormous rhetorical significance. As overt expressions of racism become a taboo mode of articulation in public life, communal anger, fear, and uncertainty over human difference must find another terminology to express the same concerns. The result has been a quantum shift in contemporary political discourse. The new term of choice, one that serves conflicting purposes, is the word *alien*. To be alien today signifies more than simply not belonging; the term now means something unpleasant enough to convey racial expression without more being said. Never has this been as clear as it is today in the debates over immigration.

IV. THE FAILURES OF IMMIGRATION LAW

The failures of immigration law are often cited but its split nature is obscured by political rhetoric. New immigrants who arrive in a nation of previous immigrants suffer from the ironic plight of “half identity” in communal understandings. The average new immigrant enters the country as a low-wage laborer in jobs that few citizens or longer-term residents want and look down upon. At the same time, the life of that worker beyond the workplace and the life of that worker’s family are treated as side issues to be ignored when they are not dismissed, scorned, or ordered to assimilate as soon as possible.

The emphasis on available labor also means money drives the legal wheel. Immigration law caters slavishly to economic trends. Prosperity leads to legal encouragement of immigration, while downturns, when jobs become scarce, demand legal discouragement with many immigrants caught in the transitions. Indeed, the institutional history of immigration law tells an even more ominous story. Congress created the Bureau of Immigration in 1891 and placed it under the Department of Commerce and Labor with encouragement of economic growth in mind.¹⁹ The Bureau was then moved more narrowly to the Department of Labor in 1913 with its more restricted focus on a cheap work force. In 1940, under the threat of war, the Bureau, then the Immigration and Naturalization Service, moved into the Department of Justice where legality and restriction became its primary focus.²⁰

The story gets worse during the extended recession and wars of today. Alien workers continue to be needed but mostly for interim work, and to find that work they must qualify under hostile scrutiny. Reconceived yet again in the wake of the terrorist attack on the United States of September 11, 2001, the Immigration and Naturalization Service has been dissolved into three separate units and placed within a conglomerate known as the Department of Homeland Security.²¹ Institutionally, immigration law now ratifies its split personality—welcoming but rejecting—with a new emphasis. Surveillance against alien forces, the primary mission of Homeland Security, has become the *raison d’être* of immigration law.

¹⁹ MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA xx (2004).

²⁰ *Id.*

²¹ Originally called the Office of Homeland Security, the Department was created by President George W. Bush on September 20, 2001, to “coordinate a comprehensive national strategy to safeguard our country against terrorism.” *A Nation Challenged on Terrorism*, N.Y. TIMES, Sept. 21, 2001, available at <http://www.nytimes.com/2001/09/21/us/nation-challenged-president-bush-s-address-terrorism-before-joint-meeting.html>. The former Immigration and Naturalization Service was reorganized within the Department of Homeland Security in early 2003. See Philip Shenon, *Threats and Responses: The Borders; U.S. Arrivals Face Radiation Check*, N.Y. TIMES, Feb. 28, 2003, www.nytimes.com/2003/03/01/us/threats-and-responses-the-borders-us-arrivals-face-radiation-check.html.

Here is how the system now works. In what one commentator has called “the Aesopian language of the immigration statutes crafted by legislators and bureaucrats,” immigration has been “trisected into separate entities” that work against each other. We have, first, the Bureau of Customs and Border Protection (CBP), which is to keep people out; second, the Bureau of Immigration and Customs Enforcement (ICE), which is to restrict entry to the country to legal immigrants; and third, the Bureau of United States Citizenship and Immigration Services (USCIS), which controls the transformation from registered legal alien to citizen while making it impossible for an illegal alien to gain that status. An explicit policy orientation exists in these lines of authority. CBP, ICE, and USCIS all report to the Department of Homeland Security’s Undersecretary for Border and Transportation Services.²²

The very term “illegal alien” represents a double negative within this legal construct. Original communal understandings of the word “alien” include “a person hostile to this country,’ ‘a native of an unfriendly country,’ ‘an enemy from a foreign land”²³ Each negative possibility leaps to mind when the adjective “illegal” is added to the concept. In law, “an alien is a person who is not a citizen.”²⁴ An accepted immigrant is “an alien who comes for permanent settlement—a ‘legal permanent resident’.”²⁵ An unaccepted, or “illegal” immigrant, on the other hand, is an alien who is “unlawfully present . . . or who otherwise commits a deportable offense.”²⁶

The word that qualifies the term “unlawful” in these understandings is the adverb “otherwise.” The distinction between mere presence and an overt act in conferring illegality disappears because of this adverb, especially when the connotations refer back to “hostile,” “unfriendly,” “enemy,” or “foreign” as definitions of “alien.” All illegal aliens thereby become criminals at large, a danger to ordinary citizens, and a menace to be answered by governmental action. Lost in the linguistic shuffle are millions of harmless individuals who live in America trapped by legal restrictions that defy solution or even amelioration.

Communal hysteria over aliens has popular sources as well. Concepts take on a life of their own in the saturation coverage of an image culture.²⁷ And so it has been with the word “alien.” Since 1979, blockbuster science fiction movies have featured the concept in titles and have tied the idea to vicious extraterrestrial and subterranean creatures, beings that destroy whole communities for no reason other than their innately foreign and malicious natures. These imaginary villains are the worst possible “illegal aliens.” They move across the screen as serial murdering psychopaths who must be eliminated, and they get purged in movie after movie but always with a hidden residue left over for the next sequel.²⁸

²² ROGER DANIELS, *GUARDING THE GOLDEN DOOR: AMERICAN IMMIGRATION POLICY AND IMMIGRANTS SINCE 1882* 261, 263–64 (2004).

²³ NGAI, *AMERICA*, *supra* note 19, at xix.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *See* DANIEL J. BOORSTIN, *IMAGE: A GUIDE TO PSEUDO-EVENTS IN AMERICA* 181–238 (1978). Boorstin argues that an image culture can be “summed up as the shift in common experience from an emphasis on ‘truth’ to an emphasis on ‘credibility.’ All of us . . . are daily less interested in whether something is a fact than in whether it is convenient that it should be believed.” *Id.* at 212. It follows that “public opinion—once the public’s expression—becomes more and more an image into which the public fits its expression.” *Id.* at 238.

²⁸ For popular movies within the *ALIEN* series that also connect with the equally negative idea of “predator,” another form of alien, see generally *ALIEN* (20th Century Fox 1979); *ALIENS* (20th Century Fox 1986); *ALIEN 3* (20th Century Fox 1993); *ALIEN RESURRECTION* (20th Century Fox 1997); *PREDATOR* (20th Century Fox 1987); *PREDATOR 2* (20th Century Fox 1990), *AVP: ALIEN V.S. PREDATOR* (20th Century Fox 2004), *AVPR: ALIENS VS. PREDATOR-*

As such, alien movies thrive on racial claims that comport with the history of discrimination in immigration law.²⁹ Both settings find and reject what is too different to accept. It is now generally forbidden to use racial slurs in public discourse, but parallel terms appear with obsessive frequency in alien movies and in many public objections to illegal aliens. In Hollywood marketing, a horrendous alternative life-form remains somewhere in American society to be rooted out. Because this being from another world often can assume human form, it holds audiences in a special way; viewers are encouraged to hate “the temporary human” in racial terms unacceptable when used against a real world entity.

The attraction in alien movies comes in this manipulative use of an intersecting vocabulary, which also informs rhetoric in the anti-immigration movements that have become powerful in American politics.³⁰ As racism in public discourse becomes costly to its user, condemnations of aliens supply a coded substitute. Cinematic aliens absorb attention by inhabiting negative American feelings for everything alien and different.

Reality then lends a hand by imitating fantasy on immigrant issues. In recent years, armed quasi-military units along the Mexican border have risen from 2,000 to over 11,000 operatives using high-tech devices. Border Patrols close to Mexico deploy unmanned aerial vehicles named “Predator Bs” to find illegal immigrants crossing the border.³¹ Everything about these teams and their weapons implies communal danger.

It is quite deliberate that the term “illegal alien” is central to national politics of fear and racial prejudice—so much so that it dominates public discourse even in locales where immigration is not a major presence.³² Governor Dave Heineman of Nebraska has made illegal immigration “the defining issue” of his successful election campaigns and legislative agendas even though his state has no border problem, a low unemployment rate, and no population density issue.³³ In Pennsylvania, legislators warn against the “illegal alien invader.”³⁴ Frequent resort to a language of “invasion” is especially significant here; it implies a country in the process of losing its identity. Conservative national commentators like Pat Buchanan and Lou Dobbs describe the nation as “Mexamerica” on the way to becoming a “Third World country.”³⁵

Excessive rhetoric is the norm on immigration. Politicians in border states gain political capital by floating wild exaggerations on the subject. John McCain, seeking re-election to the Senate from Arizona in 2010, argued that illegal immigrants were “intentionally causing accidents on the freeway.” If

REQUIEM (20th Century Fox 2007); PREDATORS (20th Century Fox 2010). These movies have spawned books, video games, spin-offs, and toys—all tied to the pejorative meaning of “alien.”

²⁹ For the history of racism and the story of quotas in American immigration law, see NGAI, *supra* note 19, at 21–55; see generally Mae M. Ngai, *The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924*, 86 J. AM. HIST. 67 (1999).

³⁰ For the sometimes veiled but racist appeals in anti-immigration organizations, see Jason De Parle, *Anti-Immigration Crusader*, N.Y. TIMES, Apr. 17, 2011, at A1.

³¹ Ross Douhat & Jenny Woodson, *The Border*, ATLANTIC MONTHLY, Jan. 2006, at 54–55.

³² For a full analysis of “the psychology behind America’s immigration fear” and its powerful influence on American politics, see John B. Judis, *Phantom Menace*, NEW REPUBLIC, Feb. 13, 2008, at 21–23. The acknowledged founder of modern anti-immigration movements, Dr. John Tanton, comes from an area in Northern Michigan that is ninety-four percent white, but that homogeneity has not stopped him from fearing a “Latin onslaught” that must be checked. See De Parle, *supra* note 30.

³³ A.G. Sulzberger, *Growing Anti-Immigrant Sentiments in an Unlikely State*, N.Y. TIMES, Oct. 3, 2010, at A16.

³⁴ Julia Preston, *Political Battle on Immigration Shifts to States*, N.Y. TIMES, Jan. 1, 2011, at A1.

³⁵ Judis, *supra* note 32, at 21–23.

one were to dwell on that possibility for just a moment, the natural question to be asked is: why would fugitives who must hide engage in such activities? In the same campaign year, the governor of the state, Jan Brewer, described “beheadings” and “kidnappings” by illegal immigrants without a shred of evidence in support. When exposed, these fabrications did not keep Senator McCain or Governor Brewer from winning their elections on rhetoric against illegal immigration.³⁶

Demagoguery of this sort gains legitimacy through the failures and lapses of immigration law. Enforcement has not stopped an estimated 850,000 illegal immigrants from entering the country every year.³⁷ In the identification of a problem of such threatening scope, the ambiguous meaning of “unlawful” when attached to “alien”—mere presence versus the need for an overt criminal act—allows the pejorative term “illegal alien” to trump the official and more neutral designation, “undocumented immigrant.” This represents a shift in terminology in keeping with failure to grant immigrants legal protections available to others in America.³⁸

The rule of law itself is stacked against immigrants. Constitutional precedent keeps them from using most legal protections and prevents them from gaining standing in federal court. Since 1889, the Supreme Court’s “plenary power doctrine” has left all policy and regulation to the political branches of government (Congress and the President) without the prospect of judicial oversight.³⁹ With the judiciary tying its own hands, immigration debates are highly political and especially hyperbolic during election cycles.⁴⁰

Complicating these negatives are several others. Immigration law forbids an illegal alien from seeking legal status, much less citizenship.⁴¹ Roughly twelve million illegal immigrants, many of whom know only the United States as their home, live without access to the opportunities that the country offers to citizens and legal immigrants, and even more draconian restrictions are on the way. Frustrated by the failures of federal law, a number of states are seeking to place limits on undocumented immigrants by denying citizenship to children born of anyone in this category (so-called “anchor babies”), by denying driving licenses, by denying access to educational institutions, by denying health benefits, by

³⁶ Gail Collins, *The Great Undebate*, N.Y. TIMES, Sept. 4, 2010, at A19. See also Interview with Jan Brewer, *Fox News* (FOX television broadcast June 16, 2010), as excerpted in Rachel Slajda, *Brewer Falsely Claimed Immigrants Beheaded People in Arizona*, TALKING POINTS MEMO (July 1, 2010, 6:43 PM), http://tpmmuckraker.talkingpointsmemo.com/2010/07/brewer_claims_illegals_are_beheading_people_in_the.php. (“We cannot afford all this illegal immigration and everything that comes with it, everything from the crime and to the drugs and the kidnappings and the extortion and the beheadings . . .”).

³⁷ Peter Skerry & Devin Fernandes, *Citizen Pain*, NEW REPUBLIC, May 8, 2006, at 14. The authors quote the figure of illegal aliens entering the country every year from The Pew Hispanic Center. For other examples of excessive political rhetoric based on the failure of immigration law, see Julia Preston, *Political Battle on Immigration Shifts to the States*, N.Y. TIMES, Jan. 1, 2011, at A1.

³⁸ For a good account of the problems in defining “illegal alien,” see Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425, 1440–45 (1995); see also 8 U.S.C. § 1101; 8 U.S.C. § 1365(b); 29 C.F.R. § 500.20(n).

³⁹ The plenary power doctrine is first articulated in *Chae Chan Ping v. United States* (Chinese Exclusion Case), 130 U.S. 581 (1889). For the history of these restrictions, see Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990). For restriction on the nature of court review, see Gabriel J. Chin, *Is There A Plenary Power Doctrine? A Tentative Apology and Prediction For Our Strange But Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257 (2000).

⁴⁰ For an account of irresponsible rhetoric regarding illegal immigrants during the presidential primaries of 2011, see Editorial, *Borderline Ridiculous: The Republican Presidential Candidates Get Immigration Wrong*, N.Y. TIMES, Sept. 17, 2011, at A20.

⁴¹ See 8 U.S.C. § 1429; 8 U.S.C. § 1227.

denying any kind of work, by confiscating vehicles, by denying the right of contract, and by conducting police checks on anyone under “reasonable suspicion.”⁴²

The proposals demonstrate a purposeful insensitivity to basic human needs. By pushing illegal aliens more deeply into “outlaw” status, the states urge them to “self-deport.”⁴³ The strategies are overt, but beyond the momentary political leverage they give proposers, the new restrictions are as misguided as they are heartless. When Alabama in 2011 decided to pass harsh immigration laws that would make the state “hostile territory” for illegal immigrants by demanding proof of citizenship or legal residency for such elemental needs as garbage pickup, school attendance, dog licenses, visits to the health department, contract reliability, and employment, many farm workers and people with children immediately went to other states, “leaving rotting crops in fields and critical shortages of labor” in their wake.⁴⁴ From those who stayed came calls from “pregnant women afraid to go to the hospital, crime victims afraid to go to the police, and parents afraid to send their children to school.”⁴⁵ Even state lawmakers and executive officers soon had to admit that their actions had “unintended consequences,” and a number of them urged that “they throw out whole sections of the law.”⁴⁶

Even for those who “self-deport” there is still no answer. Leaving the state for another does not address the problem for receiving states, and most long-time illegal aliens have no other country to go to. “They are Americans in everything but a piece of paper,” as one member of Congress recently urged in seeking amnesty for illegal immigrants raised in this country.⁴⁷ The new levels of legal restriction only compound an already difficult situation. Whatever people say or try to argue, it is impossible to remove twelve million people from the country and equally impossible to prevent undocumented immigrants from arriving. The land borders in the lower forty-eight states are too extensive to guard effectively. Those borders cover 5,525 miles, and it is hardly surprising that enforcement along Southern borders at a cost of \$2 billion a year has not measurably slowed the flow of illegal entry.⁴⁸

Current immigration policies accomplish just one thing: they increase the desperation of the officially unwanted. Federal and state authorities will collaborate on a new program called “Secure Communities,” which is a computerized fingerprint database of all entering legal immigrants. This program “will soon turn every local police department in the country into an arm of Immigration and Customs Enforcement,”⁴⁹ an institution known by the winning acronym of ICE. Unprecedented surveillance by ICE has, in fact, caught illegal immigrants at even higher rates, often through casual

⁴² Preston, *supra* note 34; Marc Lacey, *On Immigration, Birthright Fight in U.S. is Looming*, N.Y. TIMES, Jan. 5, 2011, at A1.

⁴³ For a discussion of incentives for “self-deportation,” see Neuman, *supra* note 38, at 1445; Kim Severson, *Southern Lawmakers Focus on Illegal Immigrants*, N.Y. TIMES, Mar. 26, 2011, at A13 (In supporting such a bill, South Carolina State Senator Lawrence K. Grooms declares “the bill is intended to make South Carolina a very hostile place for those who are in this country illegally. Our hope is that they leave the country or go to a state where they are more welcome.”). For a call for a more cooperative rather than an adversarial relation between state and federal regulation on immigration, see Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008).

⁴⁴ Campbell Robertson, *After Ruling, Hispanics Flee an Alabama Town*, N.Y. TIMES, Oct. 3, 2011, at A1.

⁴⁵ Editorial, *Alabama’s Shame: A Harsh Immigration Law Spreads Fear and Punishes the Vulnerable*, N.Y. TIMES, Oct. 4, 2011, at A28.

⁴⁶ Campbell Robertson, *In Alabama, Calls for Revamping Immigration Law*, N.Y. TIMES, Nov. 17, 2011, at A15; Editorial, *Alabama’s Second Thoughts*, N.Y. TIMES, Dec. 18, 2011, at SR10.

⁴⁷ Representative Luis V. Gutierrez, U.S. Representative in Congress from Illinois, *quoted in* Julia Preston, *House Backs Legal Status for Many Young Immigrants*, N.Y. TIMES, Dec. 9, 2010, at A38.

⁴⁸ See DANIELS, *supra* note 22, at 226–27 (2004); NGAI, *supra* note 19, at 265–66.

⁴⁹ Editorial, *Requiem for a Dream*, N.Y. TIMES, Dec. 24, 2010, at A22.

encounters having nothing to do with their status or behavior. In 2010, there were 390,000 deportations of illegal immigrants, a record number but still no match for the much larger numbers gaining illegal entry into the United States every year.⁵⁰ It is also true that deportation rates do not reach minimal levels of legal fairness. Those without lawyers have no chance, and for those who do, immigration judges “offer a scathing assessment of much of the lawyering they have witnessed in their courtrooms.”⁵¹

To personalize the impact of restrictive policies on undocumented immigrants, consider the plight of one after a minor fender bender in Gwinnett County, Georgia, in March of 2010. Although the accident was the other driver’s fault, the blameless immigrant was incarcerated for twelve days for not having a driver’s license that the state refused to issue her, and she had deportation proceedings started against her even though she had lived in the state as a model worker and assistant manager in a restaurant for seventeen years while raising two children who were American citizens. “If they’re here illegally in the United States,” insists the sheriff of Gwinnett County, “they should be deported regardless of the charge.” The search in Gwinnett County includes Sunday check points near churches with Hispanic worshippers.⁵²

Illegal aliens are not categorically criminals in a meaningful sense, but people who are barred from meaningful employment, who are kept from educational institutions, who fear surveillance at every moment, who face imprisonment and deportation if recognized, and who can never call on the law for protection must find ways to circumvent the rules of ordinary residents. When boxed in, human beings resist imposed restrictions.⁵³ The stringency of current policies leads to a self-fulfilling prophecy. It results in a hidden permanent underclass of illegal aliens who will use illegal means to survive. Even worse, illegal aliens become a magnet for other crimes through their vulnerability to blackmail, fraud, and unchecked intimidation.

Current immigration law thus creates what it wants to correct: crime. The pathos of this situation lies in the mounting numbers and the overall contradiction that no one wants to face. Unyielding negatives have created an intransigent problem of growing dimensions, and the hope for reform seems to exist only in the poignancy of individual cases that become newsworthy. Notably, one can ignore the enforced contradictions that many in an abstract category face, but it is harder to overlook the plight of an honest person in front of you who deserves assistance. Given a personal context, the problem becomes more apparent and encourages a solution.⁵⁴

For confirmation of these rhetorical tendencies, one need only look to Congressional debates in December of 2010 over the DREAM Act, which would have given legal status and a chance for citizenship to illegal immigrants brought to the country at a young age. The Act offering amnesty

⁵⁰ Julia Preston, *Immigration Vote Leaves Obama’s Policy in Disarray*, N.Y. TIMES, Dec. 19, 2010, at A35.

⁵¹ Kirk Semple, *In a Study, Judges Express a Bleak View of Lawyers Representing Immigrants*, N.Y. TIMES, Dec. 19, 2011, at A24; Editorial, *For Want of a Good Lawyer: Deportation Without Representation*, N.Y. TIMES, Dec. 25, 2011, at SR14.

⁵² Julia Preston & Robert Gebeloff, *Some Unlicensed Drivers Risk More Than a Fine*, N.Y. TIMES, Dec. 10, 2010, at A1.

⁵³ The seminal theoretical work on the reflexive capacities of people to circumvent or break existing rules and laws when hampered is MICHAEL DE CERTEAU, *THE PRACTICE OF EVERYDAY LIFE* (Steven Rendall trans., 1984).

⁵⁴ See, e.g., Julia Preston, *Deportation Halted for Some Students as Lawmakers Seek New Policy*, N.Y. TIMES, April 27, 2011, <http://www.nytimes.com/2011/04/27/us/politics/27immigration.html>. Olga Zanella, a Mexican-born college student in Texas, now twenty years old and brought to the United States when she was five, has been fighting deportation for two years after being pulled over by local police in February of 2009 for driving without a license and given over to immigration authorities. Local officers for Immigration and Customs Enforcement (ICE) have recently told her that she can remain in this country under the agency’s supervision if she stays in school and out of trouble. This decision and others like it recognize that the federal government’s “deportations policy remains confused and erratically implemented.” *Id.*

received majority votes in both houses, but was stopped in the Senate by failing to reach the supermajority necessary to overcome a filibuster on the issue. Not coincidentally, those against the DREAM Act spoke in generalities about the will of the American people while supporters detailed the plight of individuals caught in the problem.⁵⁵

Is there hope in a personal focus on illegal immigration? Experts in legal inquiry agree that those with strong feelings on enforcement in the abstract often change their minds when faced with an intimate context or when they have more knowledge of a case.⁵⁶ Can the personal extend to the general? When can an individual's plight begin to solve a strategic social problem? Case law sometimes works in exactly this way when an individual controversy leads to a major change in law, but here, the plenary power doctrine blocks salient immigrant issues from reaching the courts, leaving these decisions solely to the political branches of the government.

If the personal in the immigration tangle is to succeed, it must find a forum beyond legal cognizance with comparable influence. In one hopeful sign, individuals at risk have begun to emerge from their legal twilight. Poster illegal aliens, young people who have succeeded in America, are becoming newsworthy. The stories vary but contain the same message. Isabel Castillo, now twenty-six years old, graduated from high school and from college *magna cum laude* but finds herself trapped in menial jobs as an illegal alien. She has turned to radio, town-hall meetings, and legislative hearings to challenge the law and "hopes that if people get to see her close up, she will win them over."⁵⁷ Maricela Aguilar, nineteen and here from the age of three, attends Marquette University on a full scholarship. Describing her "coming out," she reveals, "I think losing the shame [of who you are] overshadows the fear. I'd much rather clarify to the public that being undocumented is just a circumstance I find myself in."⁵⁸

The appeal of courageous individuals like Isabel Castillo and Maricela Aguilar is direct. They fight for the right to succeed on the terms that American aspirations hold dear through effort, enterprise, education, public assertion, and achievement. Neither of these "undocumented immigrants" deserves to be classified as a criminal, and both argue for all who have been left in limbo despite achievement and skills that should lead to a secure life. In Ms. Aguilar's words, "one day we're going to pass this, don't even worry about it."⁵⁹ Why is courage the best term to apply to their stands? Both women live safely only as newsworthy figures. They know that media coverage gives ephemeral protection at best.

⁵⁵ See Development, Relief, and Education for Alien Minors Acts of 2010, 156 CONG. REC. H8222-41 (daily ed. Dec. 8, 2010); DREAM Act, 156 CONG. REC. S8548-S8549 (daily ed. Dec. 6, 2010), 156 CONG. REC. S8660-S8661 (daily ed. Dec. 9, 2010); and 156 CONG. REC. S10498-S10504 (daily ed. Dec. 17, 2010).

⁵⁶ The best example of this phenomenon can be found in people who advocate for the death penalty but refuse to support it if asked to do so in a particular case, or if they know anything about a defendant. "Sometimes even the staunchest advocates for the death penalty from a philosophical standpoint, when you ask if they could put pen to paper and sign a verdict for death, they say they couldn't do it," reports Frederick Benton, Defense Attorney in death penalty cases in Ohio. John Fuddy, *Death Penalty Cases in Franklin County Becoming Rarer*, THE COLUMBUS DISPATCH, Nov. 3, 2008, http://www.dispatch.com/content/stories/local/2008/11/03/cameron.ART_ART_11-03-08_A1_RMBPCE5.html. For pragmatic support of the phenomenon, see Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299 (1983), and Michelle E. Barnett et al., *When Mitigation Evidence Makes A Difference: Effects of Psychological Mitigating Evidence on Sentencing Decisions in Capital Trials*, 22 BEHAV. SCI. & L. 751, 751-70 (2004). For an argument that more knowledge of the death penalty leads to objection to it, the so-called "Marshall Hypothesis," see Carol S. Steikert, *The Marshall Hypothesis Revisited*, 52 HOW. L.J. 525, 525-55 (2009).

⁵⁷ Michael Winerip, *Dream Act Advocate Turns Failure Into Hope*, N.Y. TIMES, Feb. 20, 2011, <http://www.nytimes.com/2011/02/21/education/21winerip.html>.

⁵⁸ Julia Preston, *After a False Dawn, Anxiety for Illegal Immigrant Students*, N.Y. TIMES (Feb. 8, 2011), <http://www.nytimes.com/2011/02/09/us/09immigration.html>.

⁵⁹ *Id.*

A well told story can have a longer lasting effect. At least once in American history such a story has achieved canonical status by answering serious legal injustice. In *Uncle Tom's Cabin* (1852), the bestselling book in nineteenth-century America after the Bible, Harriet Beecher Stowe describes Senator John Bird as one who has proposed and then lived as a complacent supporter of the fugitive slave law. Suddenly, however, Senator Bird breaks that law by helping a frantic slave and her child to escape when they arrive on his doorstep.⁶⁰

Reading about Senator Bird, many in the nation began to change too. Until this moment, the Senator's "idea of a fugitive slave was only an idea of the letters that spell the word." Stowe's story transforms this abstraction into "the magic of the real presence of distress."⁶¹ For most Americans the idea of an "illegal immigrant" remains just such an abstraction. A more concrete understanding may well depend on finding new magic in the presence of distress.

V. THE ROLE OF IMAGINATIVE LITERATURE IN LAW

The ability of fiction to influence legal decision-making is rare, but it does happen. Truman Capote's non-fiction novel *In Cold Blood* from 1965 offers a modern example. Critics argue that the sympathetic portrait of a condemned man in its pages and Capote's graphic rendering of actual executions contributed to the temporary ban on capital punishment in the United States between 1972 and 1976.⁶² That said, *In Cold Blood* also typifies the cross-purposes at work in the relatively new scholarly discipline of law and literature. Any discussion of influence should acknowledge that the legal figures who worked on the case and who appear in Capote's book all objected to his versions of the criminal investigation, trial, and execution.⁶³

The tensions between law and the treatment of it by imaginative literature are inevitable ones. The law seeks justice before an obligatory audience. Imaginative literature reaches a voluntary reader by exposing injustice. The law works through calibration; it eliminates extraneous elements for a decision on narrow grounds. Literature seeks ever-expanding awareness. Everything it presents is contingent. A legal decision drives toward a single goal. The text of the novel mimics multifaceted Latin origins. The word *textum* means "web," or "woven fabric," "a framework" made up of joined strands.⁶⁴

The differences become clearest through the concept of "standing." To appear before the law, someone must have "sufficient stake in a justiciable controversy to obtain judicial resolution of that controversy." There are many hidden variables in this short statement. A litigant must be "adversely affected" in a proper jurisdiction with "a personal stake in the outcome" of "a legally protectable and

⁶⁰ HARRIET BEECHER STOWE, *UNCLE TOM'S CABIN OR, LIFE AMONG THE LOWLY* 141–61 (1986). Ann Douglas, in her "Introduction" to this edition gives the best-selling status of the novel. *Id.* at 7.

⁶¹ *Id.* at 155–56.

⁶² See, e.g., David Galloway, *Real Toads in Real Gardens: Reflections on the Art of Non-Fiction Fiction and the Legacy of Truman Capote*, in *THE CRITICAL RESPONSE TO TRUMAN CAPOTE* 144 (Joseph J. Waldmeir & John C. Waldmeir eds., 1999). *In Cold Blood* plainly contributed to a shift in public opinion that led to the temporary abolishment of the death penalty in the United States." *Furman v. Georgia*, 408 U.S. 238 (1972), created the ban. *Gregg v. Georgia*, 428 U.S. 153 (1976), lifted it for states that introduced a separate penalty phase in capital cases. Upton Sinclair's novel, *The Jungle*, in 1906 had perhaps a clearer and more immediate legal impact, though on legislative law-making rather than directly on the courts. Sinclair's description of corruption and unsanitary conditions in the meatpacking industry led to the Meat Inspection and Pure Food and Drug Acts of 1906. See James D. Hart, *THE OXFORD COMPANION TO AMERICAN LITERATURE* 435 (Phillip Leininger ed., 4th ed. 1965).

⁶³ For an account in which the legal authorities described in Capote's book react against it, see George Plimpton, *Capote's Long Ride: Thirty-Two years after the Publication of 'In Cold Blood,' the Rest of the Story Comes Out*, *NEW YORKER*, Oct. 13, 1997, at 62, 64–71.

⁶⁴ *THE OXFORD POCKET LATIN DICTIONARY* 139 (James Morwood ed., 2d ed. 1994).

tangible interest.” This personal stake must also involve a matter that has “matured or ripened” with “sufficient immediacy and reality” over “a controversy worthy of adjudication.” All of these lock-step elements—a clear right in a specific legal conflict before the proper court when the conflict is worthy and ready to be resolved—must be present “to take the initial step that frames legal issues for ultimate adjudication.”⁶⁵

Everything, no matter how helter-skelter, has standing in a novel. Nothing in fiction is ever by accident. Even the smallest details and distinctions count. By conflating fact with fiction, the novelist crafts an artificial conflict until it becomes believable to a reader. The law must grapple instead with the arrival of a messy event that must be deciphered a certain way in court. Of course, the dramatic advantages that the novel seems to have also depend on the license that lack of official power gives it. The law declares and answers. Fiction can only amuse or persuade. In law, fiction typically persuades through an injustice that the law has failed to see, found to be without standing, or thought to be unripe for decision.

The ways of talking about the interactions of literature and law can also be verbose or confusing as well as helpful. The connection between law and literature can refer to “a culture of argument” in which justice becomes a “translation” across fields of inquiry.⁶⁶ Another method of discussing the interaction between the two fields is that it can be “a witness to crisis.”⁶⁷ It can set a scene of “poetic justice” that “constructs empathy and compassion in ways highly relevant to citizenship” and “public reasoning.”⁶⁸ It can even illuminate “the ideals of impersonality, neutrality, and objectivity that inform the law,” while suggesting “a template . . . when the legal system breaks down.”⁶⁹ More dialectically, the relationship between law and literature welcomes “cross-examinations.”⁷⁰

All theories on the subject agree, however, on one basic premise. Fiction on a legal issue thrives on what has gone wrong. The connection succeeds when it can make the law see a problem that it has not solved. Senator Bird, the legal agent in *Uncle Tom’s Cabin*, comes alive when he accepts his own role in an injustice that should be rectified because it is suddenly in front of him. The direct confrontation and the fact that he risks his own life to do the opposite of what he had previously claimed to represent drive the account. Nevertheless, the transfer of his realization to a reading public depends on something else. It depends on the power of the story told—the only power that fiction really has.

Walter Benjamin explains this power by claiming that the “story contains, openly or covertly, something useful.” “The storyteller is a man who has counsel for his readers,” where “counsel woven into the fabric of real life is wisdom.” Benjamin distinguishes carefully here between information (“It lives only in the moment”) and story (“It does not expend itself.”). In effect, story remains permanently available. “It preserves and concentrates its strength and is capable of releasing it even after a long

⁶⁵ “Standing to sue doctrine,” and “Ripeness doctrine,” BLACK’S LAW DICTIONARY 1328, 1405–06 (6th ed. 1990). For the best article on the concept of standing in modern law, see Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1417–57 (1988).

⁶⁶ James Boyd White, *Introduction* to JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM i, xiii (1990).

⁶⁷ Soshana Felman & Dori Laub, *Foreword*, TESTIMONY: CRISES OF WITNESSING IN LITERATURE, PSYCHOANALYSIS AND HISTORY i, xviii (1992).

⁶⁸ MARTHA C. NUSSBAUM, *The Literary Imagination*, in POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE 1, 8–10 (1995).

⁶⁹ RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 354 (1988).

⁷⁰ BROOK THOMAS, CROSS-EXAMINATIONS OF LAW AND LITERATURE: COOPER, HAWTHORNE, STOWE, AND MELVILLE 13–16 (1987).

time.”⁷¹ Precisely how a given story transcends time and place is a mystery, and many have tried to explain the phenomenon. Most agree, though, that “one purpose of fiction is to present and reveal character in such a way as to invite moral appraisal” or alternatively, “to consider moral *character* from a philosophical point of view.”⁷² Either way, the good story must appeal to an enduring mentality. As Harriet Beecher Stowe has already shown us, there is a deeper register in a timeless story. Robert Penn Warren, novelist, poet and critic, may come closest when he asks, “Why should we, who have the constant and often painful experience of conflict in life and who yearn for inner peace and harmonious relation with the outer world, turn to fiction, which is the image of conflict?” His answer pulls us into the essential connection between story and reader: “we turn to fiction for some slight hint about the story in the life we live.”⁷³

With that personal touch in mind, we can approach Stowe’s “magic of the real presence.” E.L. Doctorow, who blends historical event with fiction in his novels, gives as good an explanation as any. “Complex understandings, indirect, intuitive, and nonverbal, arise from the words of the story, and by a ritual transaction between reader and writer, instructive emotion is generated in the reader from the illusion of suffering an experience not his own.”⁷⁴ The “ritual transaction” between Harriet Beecher Stowe and her millions of readers turns “illusion” into “reality” through “instructive emotion.” Stowe uses that emotion to graft moral credibility onto an illusion that imagination turns into a believable event.

Much more than transitory understanding is therefore at stake in a story that changes a reader’s moral compass. Senator Bird and the readers of him in *Uncle Tom’s Cabin* see a *person*—a young woman on the run from tyrannical but still legal authority. It undoubtedly helps to know that the escaping slave in Senator Bird’s house is Eliza Harris with her little son Harry, and that she has just miraculously crossed the frozen Ohio River from Kentucky on breaking blocks of ice. Stowe could bring this figure to life so vividly for herself and her readers by knowing, as many of her contemporaries knew, of an actual incident from 1838 when just such an escaping young slave woman crossed the frozen Ohio River to freedom in the town of Ripley with a child in her arms.⁷⁵

Readers of this scene, or any other in which established authority is causing harm, cannot help but feel complicit in that authority. They cannot avoid their own support of a law that hurts an individual in their midst. Whether the person hurt belongs in their midst is another question, but that issue disappears in the propinquity of the injury done by an unfair law. Story, in other words, can create a reality that people will recognize and take seriously. As Abraham Lincoln recognized when meeting Harriet Beecher Stowe in November 1862, “so you’re the little woman who wrote the book that made this great war.”⁷⁶

We read a story that touches reality to recognize the problems it contains for us, to find something about ourselves, and with an eye for what we can believe about the conflicts that fill our world. These are the timeless qualities that make Henry Roth’s novel from 1934 a proof text on current issues of immigration. *Call It Sleep* portrays the torments of the most vulnerable immigrant, a small child,

⁷¹ WALTER BENJAMIN, *The Storyteller: Reflections on the Works of Nikolai Leskov*, in ILLUMINATIONS 83, 86–90 (Harry Zohn trans., 1969).

⁷² COLIN MCGINN, ETHICS, EVIL, AND FICTION 3 (1997).

⁷³ ROBERT PENN WARREN, *Why Do We Read Fiction?*, in NEW AND SELECTED ESSAYS 55, 55–56 (1989).

⁷⁴ E.L. DOCTOROW, *False Documents*, in E.L. DOCTOROW: ESSAYS AND CONVERSATIONS 16, 16 (Richard Trenner ed., 1983).

⁷⁵ See ANN HAGEDORN, BEYOND THE RIVER: THE UNTOLD STORY OF THE HEROES OF THE UNDERGROUND RAILROAD 135–39 (Simon & Schuster eds., 2002).

⁷⁶ CINDY WEINSTEIN, THE CAMBRIDGE COMPANION TO HARRIET BEECHER STOWE 1 (2004).

and it accomplishes this task with stunning force. We are made to see the *person* at stake. An impact of this kind forces a question on its readers. How can we add new difficulties to the struggle of an innocent child without compromising the dignity and rights that are our own protection and definition?

VI. *CALL IT SLEEP*: THE IMMIGRANT'S PLIGHT RENDERED

If, as claimed, "no book in American history molded public opinion more powerfully than *Uncle Tom's Cabin*," it may be so because of the book's transparency as a novel of sentiment.⁷⁷ Upton Sinclair's *The Jungle*, with its stark realism, and Truman Capote's non-fiction novel, *In Cold Blood*, based on a factual event, have great communal impact for the same reason. All three novels are communal touchstones through easily grasped and familiar generic form. The same cannot be said of Henry Roth's *Call It Sleep*. No less a critic than Leslie Fiedler has said that it took him fifty years to understand the full implications of *Call It Sleep*.⁷⁸ Why, then, is a modernist novel laced with structural innovations, sudden breaks, linguistic byplay in other languages, obscure symbolism, gaps in logic, and endless misconnections, the best choice for conveying the reality of the immigrant's plight?

Frederic Jameson gives the beginning of a response when he suggests "that every age is dominated by a privileged form, or genre, which seems by its structure the fittest to express its secret truths."⁷⁹ Wolfgang Iser gives the rest of the answer when he explains the nature of generic integrity. Fictions of different periods depend on different "generic control of the esthetic response." The genre of a given moment supplies its own "filter of history." It presents social and historical norms that apply "to a particular environment" and establish "an immediate link with the empirical reality familiar to its readers." A reader's pleasure lies in the "discovery" of the unfamiliar against the familiar, "the unknown through the known," that a timely shift in genre can supply. Readers recognize their own reality around them through "the unfolding of the text as a living event" with "the resultant impression of life-likeness."⁸⁰

"Life-likeness" in literature in 1934, the year of publication of *Call It Sleep*, required the innovative generic techniques of modernism, a movement committed to "rebellion and innovation in new work which attempts to break with tradition."⁸¹ In the disillusioned decades following World War I, modernism challenged "a botched civilization" with what Ezra Pound famously called "frankness as never before" and "disillusions as never told in the old days."⁸² The only "secret truths" worth telling had to be told in a new way, and the grounded quality and the shock value of *Call It Sleep* owe everything to this understanding.

A certain timeliness within the genre gives life to "a particular environment" in *Call It Sleep*. Modernism coincides with the largest influx of new Americans in the first three decades of the twentieth century, and Roth's modernist novel captures the most dynamic moments in that influx, 1907 to 1913.

⁷⁷ DAVID S. REYNOLDS, *MIGHTIER THAN THE SWORD: UNCLE TOM'S CABIN AND THE BATTLE FOR AMERICA* xi (2011).

⁷⁸ Leslie Fiedler, *The Many Myths of Henry Roth*, in *NEW ESSAYS ON CALL IT SLEEP* 17, 28 (Hana Wirth-Nesher ed., 1996).

⁷⁹ FREDRIC JAMESON, *POSTMODERNISM, OR, THE CULTURAL LOGIC OF LATE CAPITALISM* 67, 88–89 (1991) (Jameson carries the point into the "generic estrangement" characteristic of writing and imagery in the Postmodern period).

⁸⁰ WOLFGANG ISER, *THE IMPLIED READER: PATTERNS OF COMMUNICATION IN PROSE FICTION FROM BUNYAN TO BECKETT* xiii, 57–59, 81, 290 (1974).

⁸¹ J.A. CUDDON, *A DICTIONARY OF LITERARY TERMS* 391 (1977).

⁸² Ezra Pound, *Hugh Selwyn Mauberly*, in *THE NORTON ANTHOLOGY OF MODERN POETRY* 346, 346 (W.W. Norton & Co., 1973).

The novel is our proof text because it is absolutely invested in the immigrant experience while stylistically using the run-ons and sudden juxtapositions in modernist technique to cauterize emotion and dramatize confusion without losing their psychological impact or allowing them to drop into sentimentality.

Two cohering elements give *Call It Sleep* a spontaneity often lacking in the genre of the immigrant novel, which generally tells its story in retrospective mode. First, Roth insists on a stark, concrete presentism as his control of the field of perception, and second, his protagonist is a child, and we are held strictly within that child's limited but perceptive point of view. As the first element encourages electrifying juxtapositions of confusion and awareness to play across the page through "severe discontinuities," "static simultaneity," "sensory apprehensions of life's surfaces," and "sustained mythic parallels"—all crucial to the heteroglossic mix in modernist narratives—so the second element, the desperation to know an unknowing boy, makes childhood the archetypal scene and puzzle of immigration.⁸³

The boy's very name, David Schearl, bespeaks the fracture that coming to America creates in his existence. "David" means "beloved," a symbol of his mother Genya's obsessive devotion, while the patronymic "Schearl" is Yiddish for "scissors," and it stands for the cutting anger of his father Albert. Albert Schearl's frequent rages and violent behavior have two sources in *Call It Sleep*. Arriving two years before his family, he has, like many immigrants, been unable to adapt to life in America and, having spent a great deal of time apart from his wife, he suspects that his young son might not be his own.

In trying to fathom an adult world that is only half understood even by the adults around them, children are at once the most adaptable, the most vulnerable, and the most frantic of immigrants. Questions are the dominant mode of a child, and David Schearl is filled with them. Unlike other children, however, he dares not ask those questions aloud in his divided household, representing the bewilderment of every mind in a totally new environment. The unspoken questions tumble upon us half articulated through an inner stream of consciousness. Roth uses this silence in his frightened child to expose the conflict in the immigrant experience for what it is, a familial landscape of ferocious intensity.

All of David's fears are confirmed in the end. The indelible image that he holds of his father is of a raised hammer poised to strike, and it will turn into the truth of the book. In a final cataclysm, Albert loads his misfortunes onto the belief that David is "a goy's get" rather than his own son. By "whirling the whip in his flying hands," he tries to kill the son who is so different from himself and becoming more different every day.⁸⁴

Much commentary has sought to verify Albert's assumption about the paternity of David, but in the momentums of immigration, Albert has no son and certainly never had the son he thinks he needs. America, not biology, has taken the son from the father. In introduction to others, Albert objectifies David as "what will pray for me after my death."⁸⁵ The phrase bespeaks the Jewish tradition of a son who remembers and prays after his father, but Albert is raising a son who, in trying to adapt to the new world his father cannot fathom, sees only "the face of a foe."⁸⁶ The single thing David wants from the angry failure of a father he hates is the same physical strength in order to be free of him.⁸⁷

⁸³ For the quoted characteristics in modernism, see MICHAEL H. LEVENSON, *A GENEALOGY OF MODERNISM: A STUDY OF ENGLISH LITERARY DOCTRINE 1908–1922* 201–06 (1984). For childhood as the archetype of immigration, see Ruth Wisse, *The Classic of Disinheritance*, in *NEW ESSAYS ON CALL IT SLEEP* 61, 61–62 (Hana Wirth-Nesher ed., 1996).

⁸⁴ HENRY ROTH, *CALL IT SLEEP* 27, 401–02 (2005).

⁸⁵ *Id.* at 29.

⁸⁶ *Id.* at 114.

⁸⁷ *Id.* at 78, 177.

Chilling indifference and vortices of fear also define the world beyond the home. The boy's first expressed thoughts are devastating in their portrayal of the immigrant condition: "David again became aware that this world had been created without thought of him".⁸⁸ Every immigrant experiences this alienation from a new reality. The receiving world has no reason to make room, and its rhythms remain indifferent to the latest perceiver of them. All of the struggle to understand, all of the adjustments to belong, all of the effort to be understood must be made by the new arrival, and David can only do so with internalized miscomprehension. Quick to perceive, he lacks a context for understanding. There may be no greater terror for a keen observer than the need to know against the knowledge that you cannot learn what is important to know.

The misunderstandings, mistakes, abuse, guilt, and prejudices that guide the immigrant plot toward catastrophe are all heightened by the modernist stream of consciousness that Roth uses to convey the psychology and thought processes of a figure defined by "watchful, frightened eyes".⁸⁹ Silent except when forced to speak in the confusion of languages available to him, David can find no purchase in a world against him. Lost in the city, he jumbles thought processes in panic when taken to a police station:

Trust nothing. Trust nothing. Trust nothing. Wherever you look, never believe. If you played hide'n'-go-seek, it wasn't hide'n'-go-seek, it was something else, something sinister. If you played follow the leader, the world turned upside down and an evil force passed through it. Don't play Never believe. Never play. Never believe. Not anything. Everything shifted. Everything changed. Even words Trust nothing. Even sidewalks, even streets, houses, you looked at them. You knew where you were and they turned. You watched them and they turned. That way. Slow, cunning. Trust no'—.⁹⁰

David lives by a desperate controlling insight. He must hold himself apart to survive, and there is pathos in how lonely he has become in that recognition. The compounded negatives in his thoughts convey impossible levels of disbelief and doubt. David's alienation carries to every conceivable level of implication; people, words, buildings, even play are all suspect. Dimension itself has failed him. Everything has animate force, and it is ranged against him with malevolent intent. The quick linear sequence of phrases turns David's terror into a palpable force that we feel as well as read.

The power of the novel lies in our visceral awareness of an alienated and necessarily fragmented immigrant mind constantly at work but misfiring because it is so obsessively alone. Even so, there is no room to blame David's erring mind as it causes its own waves of distrust and anxiety. The strength of intellect in an innocent child is our guide. Whatever has gone wrong, no reader can place the wrong in David Schearl. The circumstances that nearly kill him belong to the immigrant's plight. We cannot expect David to do better than he does. All we can do is hope for his survival under better conditions.

Looking to David's strength of mind, some readers have found a semiotic bildungsroman of growth in David's mastery of the language mix in *Call It Sleep* (his precocious knowledge of Yiddish, English and especially Hebrew, but *not* the Polish of his parents' land).⁹¹ Others use Roth's interwoven Jewish and Christian references to create a unified symbol system.⁹² Still others rely on the ghetto setting

⁸⁸ *Id.* at 17.

⁸⁹ *Id.* at 10, 173. In the second passage, Genya asks her son "Aren't you just a pair of eyes and ears!" Then, unconsciously, she gives us the problem of the book. "You see, you hear, you remember, but when will you know?" *Id.* at 173.

⁹⁰ *Id.* at 102–03.

⁹¹ See Naomi Diamant, *Linguistic Universes in Henry Roth's Call It Sleep*, 27 CONTEMP. LITERATURE 336, 336–37 (1986).

⁹² James Ferguson, *Symbolic Patterns in Call It Sleep*, 14 TWENTIETH CENTURY LITERATURE 211, 218–19 (1969).

to see a working-class novel with David as the avatar of labor movements.⁹³ Psychoanalytic approaches emphasize Oedipal implications.⁹⁴ Myth critics give David the childhood of a New-World messiah.⁹⁵ Mythic subtexts and insertions of the highly spiritual in ordinary life—modernist techniques borrowed from T.S. Eliot and James Joyce—have encouraged the widest interpretive range.⁹⁶ So many possibilities also exist because Roth's protagonist is very early in the process of being formed by a hostile environment that bears no resemblance to the presumed land of promise and opportunity.

More than anything, the novel describes the struggle of a small immigrant boy teetering on the brink of physical and psychological breakdown in a world he dreads far more than he inhabits. From the outset, *Call It Sleep* privileges negative shocks of recognition in the immigrant's plight. The book opens with the symbolic placement of Genya and David "in wonder" before the Statue of Liberty, but their wonder is negative rather than the conventionally assumed scene of awe on arrival. Neither mother nor child sees a beckoning beacon of light. In splintered fragments of prose "the massive figure" of the statue looms ominously above them "charred with shadow"; her halo, "sparks of darkness roweling the air"; her torch "the blackened hilt of a broken sword".⁹⁷ Genya's articulation is correspondingly bleak. "Ach!," she cries. "Then here in the new land is the same old poverty".⁹⁸

Roth's child protagonist lives in permanent alarm as he endures trauma after trauma in a confusing and openly threatening ghetto of mutually antagonistic immigrant groupings, and he is eventually driven beyond all endurance. Walking home toward what he expects to be certain doom—a reality avoided only by extraordinary interventions—David's mind approaches total collapse. So beaten down is the boy that he merges his identity in the objects of the store windows that he passes. Roth's stream of conscious narrative is horrifying in its capacity to illustrate a fragmenting mind falling out of control:

Only his own face met him, a pale oval, and dark, fear-struck, staring eyes, that slid low among the windows of the stores, snapping from glass to glass, mingled with the enemas, ointment-jars, green globes of the drug-store—snapped off—mingled with the baby clothes, button-heaps, underwear of the drygoods store—snapped off—with the cans of paint, steel tools, frying pans, clothes-lines of the hardware store—snapped off. A variegated pallor, but pallor always, a motley fear, but fear. Or he was not.

—On the windows how I go. Can see and ain't. Can see and ain't. And when I ain't, where? In between them if I stopped, where? Ain't nobody. No place. Stand here then. BE nobody. Always. Nobody'd see. Nobody'd know. Always. Always No.⁹⁹

⁹³ Kenneth Ledbetter, *Henry Roth's Call It Sleep: The Revival of a Proletarian Novel*, 12 TWENTIETH CENTURY LITERATURE 123, 123–30 (1966).

⁹⁴ Tom Samet, *Henry Roth's Bull Story: Guilt and Betrayal in Call It Sleep*, 7 STUDIES IN THE NOVEL 569, 569–83 (1975); Werner Sollors, 'A world somewhere, somewhere else': Language, Nostalgic Mournfulness, and Urban Immigrant Family Romance in *Call It Sleep*, in NEW ESSAYS ON CALL IT SLEEP 147, 147–56 (Hana Wirth-Nesher ed., 1996).

⁹⁵ Lynn Altenbernd, *An American Messiah: Myth in Henry Roth's Call It Sleep*, 35 MODERN FICTION STUDIES 673, 673–74 (1989).

⁹⁶ For Roth's clear indebtedness to Eliot and Joyce, see Brian McHale, *Henry Roth in Nighttown, or, Containing Ulysses*, and Karen R. Lawrence, *Roth's Call It Sleep: Modernism on the Lower East Side*. *Id.* at 75–126.

⁹⁷ ROTH, *supra* note 84, at 14.

⁹⁸ *Id.* at 12.

⁹⁹ *Id.* at 378–79.

The modernist aesthetic of compression and concreteness illustrates how the windows “happen” to the boy instead of receiving his movement across them. The windows “snap off,” and the shift in agency allows David to dissolve when his reflection does not appear in them. Passivity of this kind can trouble any stranger momentarily on unfamiliar terrain, but David is permanently estranged and much more deeply hurt. He no longer exists or wants to exist. “Ain’t nobody. No place.” Even worse, he asks directly to “BE nobody.”

The traumatized boy lacks all sense of his own identity in place. Caught between home and the street without the means of bringing them together in meaningful terms, David suffers from disassociations familiar to a new foreign-born resident, but they are magnified in him by the calamity of total rejection at every level even though nothing that happens is his fault. The brilliance in Roth’s use of the child protagonist lies in the creation of an innocent figure who can believably think everything is his fault.¹⁰⁰ Trudging toward the home that is a domestic battleground, David Schearl is *immigrant agonistes*. He turns into the quintessential alien, alienated even from himself. The reader is left asking, “who or what will help?”

Roth’s answer comes in an astounding affirmation out of relentless negation. Throughout *Call It Sleep* the many separate denizens of the street have been animated by anti-Semitism, malice, theft, confrontation, ridicule, and indifference, but they miraculously join together and come to the rescue at novel’s end. Roth posits a subliminal good will in the common denominator of the people, not an unusual assumption in either American fiction or American politics. This seemingly collectivized sense of virtue is not explained, but it lives in the sporadic exchanges of the misfits and hangers-on that help David.

David nearly dies twice. First, under the uncontrolled blows of his father—“Let me strangle him! Let me rid the world of a sin!”¹⁰¹—and then in panic-stricken flight into the uncaring streets of New York. Running away from “a reeling smear of words, twitching gestures, fractured lights, features, a flickering gauntlet of tumult and dismay”¹⁰², the terrified boy reaches for the guiding hand he has never had. He unleashes the only alternative source of power he has ever seen, and there is authorial purpose in making that source mechanical in origin rather than human. The machinery of industrial America is the immigrant’s resort, the tool for initial advancement, and all too often, a zone of peril and misfortune.

Peril is the result here. David’s father has become a milkman, and the boy inserts the father’s steel milk dipper into the live third rail of railroad tracks near his home, nearly electrocuting himself in a desperate quest for alternative meaning. Knocked unconscious and badly burned, David is saved by the unlikeliest of sources. Street people, the inhabitants of Roth’s personal version of T.S. Eliot’s Waste Land, led by a medical intern and a stock Irish policeman, join hands to recover the boy and return him to his home.

This last scene also gives us Roth’s ambiguous, much discussed title. Spurned, nearly electrocuted, burned and filled with “torpid heart-break” lying on his bed of pain, the boy hears his mother say “you’ll go to sleep and forget it all.” We know that he will forget nothing, and he tells us so when he thinks, without saying, “one might as well call it sleep” with the added phrase “it was only toward sleep that he knew himself”.¹⁰³ A mantra repeated over and over again by the boy who watches

¹⁰⁰ This device, of an innocent thinking everything is his fault, mimics the tendencies in anyone overwhelmed by hegemonic as well as pervasive racial prejudice as Roth seems to have been early in his life.

¹⁰¹ ROTH, *supra* note 84, at 402.

¹⁰² *Id.* at 402–03.

¹⁰³ *Id.* at 440–41.

everything around him through half-closed eyes, these phrases complete the book. As always, David's thoughts are not shared with anyone, and they contradict everything that has been said to him.

What do these mysteriously reiterated phrases finally mean? Call it sleep, as opposed to actual sleep, suggests what the thinker of the phrase has been from the beginning. The words define an active mind kept hidden from others and ultimately from itself. The endangered boy finds himself only in the privacy that his pretense of sleep creates in a crowded room. He has learned it is unsafe to speak, and so he remains proverbially silent. But if this is safety, what kind of growth, except twisted growth, can we expect from this? David exists only in a closed prism of apprehension. He is the most traumatized immigrant in American fiction, but no one sees it until he is seriously hurt, and here is our real quandary. What level of vulnerability is required in an immigrant figure on American soil before the world will help? The question could not be more obvious, but what gives it such flashing immediacy in *Call It Sleep*?

All of the conventional negatives of the immigrant novel abound in *Call It Sleep*: dislocation, vocational despair, confused realities, misunderstanding, language difficulties, discrimination, racism, poverty, generational conflict, domestic strife, fear of authority, and disappointment in America as found. Immigrant novels are also tortured by the imperative of assimilation because nothing seems more impossible within the generational moment that these novels choose to depict. The typical immigrant account is dominated by tribulations viewed from hindsight. Nothing has turned out the way its protagonists have imagined, and everything is less than it should be. No other form in American literature insists quite so stridently on the unfairness of history. Loss and regret are its defining characteristics, the calling cards of the genre.¹⁰⁴

Even so, the question of who will help, who will answer the immigrant's plight, does not attract notice in the typical immigrant novel in the way that it does in *Call It Sleep*. The same thematic factors percolate across the pages of Henry Roth's novel, but his use of them is anything but conventional. The hard mimetic look that modernism insists on giving to the ills and fragmentation of civilization through a sophisticated intellectual lens allows Roth to break free of literary conformity and rework generic needs.¹⁰⁵

Roth uses the exigency that modernism gives narrative trajectory to make the anxieties in the immigrant's plight uniquely spontaneous, and he couches his themes within a boy's naiveté where only perception, not sincerity, can be questioned. David Schearl's obvious intelligence struggles with his childish bewilderment, and the poignancy in that dualism creates a victim who is both a precious commodity and a person of worth.¹⁰⁶ His situation foreshadows the equally poignant plight of aliens made fugitives in America today.

Today, David Schearl would have a Spanish name, and he would be subject to even deeper uncertainties, fears, discrimination, domestic conflict, and abuse because this time, as an undocumented immigrant, his ignorance would not have the saving grace of an available education. He would have to live in partial hiding, possibly on the move, and his parents would have more difficulty finding work. If they found employment at all, they could lose it at any moment, and they would have no communal

¹⁰⁴ For canonical examples of these generic characteristics, see ABRAHAM CAHAN, *THE RISE OF DAVID LEVINSKY* (1917); ANZIA YEZIERSKA, *BREAD GIVERS* (1925); O.E. RÖLVAAG, *GIANTS IN THE EARTH* (1927); MARIO PUZO, *THE FORTUNATE PILGRIM* (1964).

¹⁰⁵ This intellectual lens includes an "austerely pessimistic vision of human life and history," an "unillusioned 'classical' sophistication," the belief that American civilization has taken a wrong turn, and the tough-minded need to expose debased spirituality and lost direction in contemporary understandings. See DAVID PERKINS, *A HISTORY OF MODERN POETRY: FROM THE 1890S TO POUND, ELIOT, AND YEATS* 100–31, 294–300 (1976).

¹⁰⁶ External proof of David's high intelligence comes in the section called "The Rail" from the one educated if misguided figure in the novel. When David gives an inspired reading in Hebrew, his rabbi drums the boy's forehead with a blunt finger and finds "an iron wit" there. Roth, *supra* note 84, at 510.

resources against illness or injury. They would find similar but more intense levels of discrimination, racial hatred, and exploitation directed at them from surrounding communities in their “illegality.”

Take the following possibilities. Any one of Albert’s altercations in the novel—threats and fights outside of the home and physical abuse within it—might mean deportation today in an undocumented immigrant. The saving rescue and return to the home by the police at the novel’s end would certainly lead to the disaster of identification. David and Genya, if not deported with Albert, would face hard choices—they could join the further enraged domestic abuser in impecunious exile or risk destitution or seek the alternative of a life in crime. Genya, who lacks knowledge of the ghetto around her and of the English language, would be helpless, and her eight-year-old son, if not already deprived of education by law, would have to leave school to help in any way he could.¹⁰⁷ If by luck or design they thrived, both would live in fear of exposure and deportation all of their lives no matter what they did or managed to accomplish.

These differences indicate that *Call It Sleep* is not the answer but rather a precursor or model pointing the way to an aspect of an answer. The pivotal element, a catalyst for change, could be a Latino best-selling novel. Perhaps the generic integrities of that moment will dictate a movie instead, or a television show, a gigantic blog, a connecting social network online, or even a video game, but regardless the inevitable theme will be how current legalities hurt the rule of law more than they help it. It has, after all, happened that way before. But if so, the story, like its subject, remains shrouded in amorphous American understandings, and fiction is not evidence, it is mental engagement. Left for analysis are the emerging conditions that might make such engagement a catalyst toward larger understandings.

VII. THE SEARCH FOR ANSWERS

We have seen that ideological contradictions over immigration are deeply embedded in American culture just as they once were over slavery. Change depends on how the shifting nature of these contradictions play across the events that control them. In one of the consummate strategies of *Call It Sleep*, Henry Roth places the contradictory attitudes toward ethnic minorities in his wayward figures of the street. His street people are hostile or caring depending on the moment and a certain caprice. In the same way, contending spirits of welcome and restriction—the reflexive helping hand against the equally reflexive push of rejection—chase each other in every argument about aliens in America. Roth finds a way to turn these ambiguous forces into a helping hand, but it takes a crisis for it to happen.

How close are we to a crisis involving undocumented immigrants? No one can say, but there are signs of a more general concern. We can use analogies in public discourse between slavery in antebellum America and illegal aliens today to suggest some of the dynamics at work. For just as the Fugitive Slave Act of 1850 galvanized heightened controversy, so the severe restrictions that states like Alabama, South Carolina, and Arizona have placed on undocumented immigrants have led to heightened communal scrutiny today.¹⁰⁸ Just as legality over runaway slaves became a focus for public debate, so the decisions that judges now make to uphold or block state laws on undocumented immigrants have led to new alarm over what those laws might mean to the people affected and surrounding communities.¹⁰⁹

¹⁰⁷ An immigrant novel that makes much of the need to forego education for the lowest rung of the labor force by a very young immigrant boy is: MICHAEL GOLD, *JEWS WITHOUT MONEY* (Transaction Publishers 1997) (1930).

¹⁰⁸ For protests against the Fugitive Slave Act when it reached a legal forum, see GORDON S. BARKER, *IMPERFECT REVOLUTION: ANTHONY BURNS AND THE LANDSCAPE OF RACE IN ANTEBELLUM AMERICA* (2010). For evidence of one of one of many extended public discussions over severe new state restrictions on undocumented immigrants, see Campbell Robertson, *In Alabama, Calls for Revamping Immigration Law*, N.Y. TIMES, Nov. 17, 2011, at A15.

¹⁰⁹ For a good account of antebellum legal tensions, see ALBERT J. VON FRANK, *THE TRIALS OF ANTHONY BURNS: FREEDOM AND SLAVERY IN EMERSON’S BOSTON* (1998). For parallel tensions today, see Campbell Robertson, *Alabama Wins in Ruling On Its Immigration Law*, N.Y. TIMES, Sept. 29, 2011, at A16; *Alabama: Judge Blocks Part of Immigration*

The fact that controversy in both historical moments focuses on specific legal action suggests that an even larger analogy is at work. Uneasiness enters the American rule of law whenever decent people under its province are deprived of fundamental rights, and we can see as much in both moments. Even as great an avatar of regional legality as John C. Calhoun sounds a little queasy when he claims, “[B]e [slavery] good or bad, it has grown up with our society and institutions, and is so interwoven with them, that to destroy it would be to destroy us as a people.”¹¹⁰ An adamant theorist of nullification, Calhoun still cannot help sounding misguided when he says that liberty does not belong to “the undeserving” as “the result of some fixed law.”¹¹¹ Which fixed law? Where can we find Calhoun’s “necessary moral qualifications” that say slaves cannot live “under any other than an absolute and despotic government”?¹¹² The nature of the problem means that a lawyer like Calhoun cannot rely simply on power. He feels compelled to twist the language of law and morality to answer a rule of law that is normative logic as well as imposition.¹¹³

Some of the same queasiness drives legal discussions of undocumented immigrants today, and for the same reason. The problems defy meaningful legal solutions under present circumstances. Two Supreme Court decisions, *Graham v. Richardson*¹¹⁴ in 1971 and *Mathews v. Diaz*¹¹⁵ in 1976, symbolize the ambivalence at work. Under *Graham v. Richardson*, the Supreme Court will not let the States “favor United States Citizens over aliens in the distribution of welfare benefits”¹¹⁶ because the Fourteenth Amendment safeguards the life, liberty, and property of “any person.”¹¹⁷ The protection of the Amendment thus “encompasses lawfully admitted resident aliens as well as citizens of the United States and entitles both citizens and aliens to the equal protection of the laws of the State in which they reside.”¹¹⁸ *Graham* restricts its decision to legal or resident aliens, but Associate Justice Blackmun, writing for the Court, goes much further when he announces in dicta that “classifications based on alienage, like those based on nationality or race, are inherently suspect” and deserve “heightened judicial solicitude.”¹¹⁹

Nevertheless, this “solicitude” seems to disappear in *Mathews v. Diaz*. The Supreme Court holds there that “Congress may condition an alien’s eligibility for participation in a federal medical insurance

Law, N.Y. TIMES, Dec. 13, 2011, at A22; and Robbie Brown, *Parts of Immigration Law Blocked in South Carolina*, N.Y. TIMES, Dec. 23, 2011, at A18.

¹¹⁰ John C. Calhoun, On the Reception of Abolition Petitions, Address Before the United States Senate (Feb. 6, 1837), in 2 THE WORKS OF JOHN C. CALHOUN 630 (Richard K. Crallé ed., 1854–1856).

¹¹¹ John C. Calhoun, *Disquisition on Government and a Discourse on the Constitution and Government of the United States*, in THE WORKS OF JOHN C. CALHOUN 1, 55 (Richard K. Crallé ed., 1851). *Disquisition on Government* is generally thought to have been written in the early 1840s, though only published in 1851.

¹¹² *Id.* at 54.

¹¹³ Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 10 (1983). Cover finds that a rule of law must be justified by both “a legal world conceived purely as legal meaning” through normative understanding and “the more familiar notion of law as social control.” The legal theorist in Calhoun fully understands that he must respond on both levels.

¹¹⁴ *Graham v. Richardson*, 403 U.S. 365 (1971).

¹¹⁵ *Mathews v. Diaz*, 426 U.S. 67 (1976).

¹¹⁶ *Graham*, 403 U.S. at 370.

¹¹⁷ *Graham*, at 371.

¹¹⁸ *Graham*, at 371–72. See also U.S. CONST. amend. XIV, § 1. (“[N]or shall any State deprive *any person* of life, liberty, or property, without due process of law; nor deny to *any person* within its jurisdiction, the equal protection of the laws”) (emphasis added).

¹¹⁹ *Id.* at 372–73.

program” in a way that “does not deprive aliens of liberty or property without due process of law.”¹²⁰ Curiously, though, as the Court backs down from *Graham*, it also strives to limit the distance covered. “Even one whose presence in this country is unlawful, involuntary or transitory is entitled to that constitutional protection [offered by the Due Process Clause of the Fourteenth Amendment],” the Court asserts, citing *Graham* and a string of other opinions in support of immigrant rights.¹²¹ Clearly, this second comment broadens the scope of the opinion more than it needs to by acknowledging the presence of illegal aliens. Unhappiness and uncertainty over the immigration debate is alive in the court’s discussion.

If there are entitlements for immigrants, what are they, and how far do they extend? Deferring to the plenary power doctrine that gives regulation of immigration to “the political branches of the Federal Government,” the Court in *Mathews* shuts the door on a larger solution. “[I]t is obvious that Congress has no constitutional duty to provide all aliens with the welfare benefits provided to citizens,” Associate Justice Stevens asserts,¹²² distinguishing *Graham* (applicable to the States) from *Mathews* (applicable to the Federal Government) on federalism grounds.¹²³ Is it so obvious? Even here, one can sense some queasiness and a twinge of regret. Indeed, Justice Stevens cannot keep himself from acknowledging that “disparate treatment is ‘invidious’”¹²⁴ and subject to charges of “political hypocrisy.”¹²⁵

The legal minuet in cases like *Graham* and *Mathews* gives hopeful immigrants the prospect of rights without remedies. It holds all immigrants in place, in a no-man’s land far from the dance floor, without elemental protections, and it recognizes undocumented immigrants while keeping them in their outlaw status without possibility of meaningful recovery or rectification. The problems, in other words, remain intractable in the eyes of the law. Or is it better said that the problems depend on how they will be brought to the law?

The antislavery movement addressed its own intractable problem, that of slavery, in three ways. It depended on relatively few leading figures who demonstrated the courage of their convictions.¹²⁶ It fed popular recognition of the problem through antislavery conventions, fairs, publications, lectures, and the sale of household artifacts bearing the message of abolition.¹²⁷ It also told a good story that those who believed in a rule of law could not ignore. Harriet Beecher Stowe told the story, but Wendell Phillips, “greatest of the antislavery orators,” gave it legal heft when he condemned “a Christian nation denying, by statute, the Bible to every sixth man and woman of its population, and making it illegal for ‘two or three’ to meet together, except a white man be present!”¹²⁸

¹²⁰ *Mathews*, 426 U.S. at 67.

¹²¹ *Id.* at 82, 85.

¹²² *Id.* at 83.

¹²³ *Id.* at 85–86.

¹²⁴ *Id.* at 80.

¹²⁵ *Id.* at 86.

¹²⁶ For an account of these leading figures, see JOHN STAUFFER, *THE BLACK HEARTS OF MEN: RADICAL ABOLITIONISTS AND THE TRANSFORMATION OF RACE IN AMERICA* (2002).

¹²⁷ Antislavery conventions and fairs were popular events by the 1840s. One held on October 6 and 7, 1840 in Worcester, Massachusetts is popularized in *THE LIBERATOR*. See *Eighth Annual Meeting of the Massachusetts Anti-Slavery Society*, *LIBERATOR*, Sept. 10, 1840, available at <http://www.primaryresearch.org/bh/liberator/290.jpg>.

¹²⁸ Wendell Phillips, *Philosophy of the Abolition Movement, Address to the American Anti-Slavery Society*, in *SLAVERY ATTACKED: THE ABOLITIONIST CRUSADE 142, 142–43* (John L. Thomas ed., 1965). It is Thomas who says Phillips is the greatest abolitionist orator.

Some of the same combinations of elite articulators attached to local or grassroots performances are beginning to emerge in connection to the plight of immigrants in America today. This connection is reinforced by the use of instantaneous and widespread electronic communication. When, for example, the American Heritage Dictionary in its fifth edition published and then broadcast a bland definition of the controversial phrase “anchor baby” in November of 2011, the Immigration Policy Center, a pro-immigration research group in Washington, led an immediate campaign in the blogosphere against “the poisonous and derogatory nature of the term” and quickly gained a revised dictionary definition, which then identified the term as “offensive” and relegated “to how the dictionary treats a wide range of slurs.”¹²⁹

A more enduring connection of levels of activism comes through the Coalition of Immokalee Workers (CIW), a community center with national outreach. CIW helps documented as well as undocumented immigrants by providing attention to their material well-being, by handling specific problems in discrimination, and by working with other social agents to win immigrants dignity and proper recognition of their rights. The organization works in the field with immigrants, especially with those in farming settings. Its website features notable political figures such as Jimmy Carter, Hillary Clinton, and Barack Obama and has established connections with members of the U.S. Senate, the Department of Labor, the Department of Justice, and the Department of State.¹³⁰

These and other initiatives demonstrate a way in which new understandings of a growing problem can develop. Already, the federal government has been reviewing the strictness of its deportation policies.¹³¹ Of course, more official legal reform is the goal of pro-immigration groups. The communal impetus for such reform and the catalysts that might make it happen, however, are in the future.

An estimated twelve million illegal immigrants in the current United States live with fear and vulnerability every day. If their difficulties are not as apparent as in *Call It Sleep*, it is because everything about them must remain hidden from the law and from anyone who might report them, including law-abiding employers. For most Americans, undocumented immigrants remain a concept rather than the physical reality of hardships inflicted on individual lives. These millions dare not speak in public. They cannot apply for better jobs if they are lucky enough to have one, which can all too easily be taken away. Communal services are kept from them. They must shun places of worship where they might be identified, and they risk exposure and deportation if one of them is placed in an educational institution. When does it begin to become dangerous to have so many people living without basic rights or possibilities in a country where well-being is defined by those rights and possibilities?

How does a country recognize its better self? On January 6, 1941, President Franklin D. Roosevelt made an important effort through his identification of four vital freedoms: freedom of speech, freedom of worship, freedom from want, and freedom from fear. The four together symbolized “the supremacy of human rights” in the world and defined “a friendly, civilized society” at home, a society in favor of “a perpetual peaceful revolution—a revolution that goes on steadily, quietly, adjusting itself to changing conditions.”¹³² Today fixed conditions in the United States deprive every illegal alien of all four

¹²⁹ Julia Preston, *Anchor Baby: A Term Redefined as a Slur*, N.Y. TIMES, Dec. 9, 2011, at A21. The original definition ran “a child born to a noncitizen mother in a country that grants automatic citizenship to children born on its soil, especially such a child born to parents seeking to secure eventual citizenship for themselves and often other members of their family.”

¹³⁰ See COALITION OF IMMOKALEE WORKERS, <http://www.CIW-online.org> (last visited Apr. 3, 2012). I owe the knowledge of this source and information about it to Professor Mark Barenberg and CIW’s website.

¹³¹ Julia Preston, *U.S. to Review Cases Seeking Deportations*, N.Y. TIMES, Nov. 17, 2011, at A1.

¹³² President Franklin D. Roosevelt, State of the Union Address (Jan. 6, 1941).

freedoms with the dignity that goes with them, and legal surveillance of the deprived has reached levels of intrusive sophistication that begin to alter the meaning of community for everyone in it.

What will it take to correct a problem of such alarming and growing proportions? General emancipation came only in the violence of civil war when a slave population had reached almost four million or twelve percent of the population then in the United States. Illegal immigrants now represent three times that number in population, and if the estimates of illegal entry continue to remain in such excess of deportation rates, the same per capita rate of twelve percent could be reached in a lifetime. Roughly speaking, that would mean the presence of forty million souls without rights or expectations in America.¹³³

Can the United States, “a friendly, civilized society” find a way to adjust to this “changing condition”? How will it happen and will it be done “quietly” as part of “a perpetual, peaceful revolution” or violently? The catalyst of change, if there is to be one, must almost certainly come from outside of official channels, and it must tell a story that large numbers will want to hear and absorb. The form of that story, now unknown, must be as highly recognizable and powerful as its message. Whatever its form, the message itself will say that current legalities hurt the rule of law more than they help it. Will the rule of law, part normative and part impositional, listen? For that to happen, the story will have to be extremely well told. It will be the story of the millions of illegal aliens who belong to America because they have been brought up in America with American values and have no other place to go.

¹³³ The figures in this paragraph are necessarily estimates and dependent on fluctuating economic conditions that either attract or discourage illegal immigration in a given year. United States Census, 1860, finds a total population of 31,443,321. The best-informed estimate for a slave population in 1860 is 2,953,760. *See* DONALD B. DODD, *HISTORICAL STATISTICS OF THE STATE OF THE UNITED STATES: TWO CENTURIES OF THE CENSUS, 1790–1990* 103 (1993). *See also* JOHN CUMMINGS & JAMES ADNA HILL, *NEGRO POPULATION, 1790–1915*, at 53 (1918). U.S. Census figures for the current United States place total population at 313,520,824. *See* U.S. CENSUS BUREAU, www.census.gov/population/www/popclockus.html (last visited May 10, 2012).